IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 3:16-cv-00769-HTW-LRA**
DANNY'S RESTAURANT, LLC AND DANNY'S OF JACKSON, LLC F/K/A BABY O'S RESTAURANT, INC D/B/A DANNY'S DOWNTOWN CABARET	)	
Defendants.	)	

PLAINTIFF UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S MEMORANDUM IN SUPPORT OF MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES

INTRODUCTION

Plaintiff, United States Equal Employment Opportunity Commission ("EEOC"), filed this action against Danny's Restaurant, LLC, Danny's of Jackson, LLC f/k/a Baby O's Restaurant, Inc., d/b/a Danny's Downtown Cabaret (collectively "Danny's" or "Defendant") on September 30, 2016 on behalf of Ashley Williams and a class of five individuals, pursuant to Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991. (Doc. 1). In its Complaint, the EEOC alleges that Defendant violated Title VII by subjecting Williams and the members of the class to disparate terms and conditions of employment based on race, and discharging Williams because of her race. *Id*.

The EEOC now moves pursuant to Federal Rule of Civil Procedure 12(f) for an order striking Defendant's sixth affirmative defense and affirmative defense "(L)" from the Answer.

(Doc. 5). Each of the challenged defenses, in the form and manner asserted by Defendant, is insufficient as a matter of law. They assert defenses that do not exist to EEOC enforcement actions, confuse the issues, are legally insufficient, or are not pleaded with sufficient particularity to provide the EEOC with fair notice of the defense being advanced. Failure to strike the aforementioned defenses would unnecessarily delay this action and prejudice the EEOC by requiring it to undergo lengthy and burdensome discovery on unavailable, vague or insupportable defenses.

The EEOC respectfully requests that the Court strike the above-referenced defenses from Defendant's Answer for the reasons set forth below.

ARGUMENT

I. Legal Standard

A. The Court has Authority under Rule 12(f) to Strike Any Insufficient Defense

Rule 12(f) of the Federal Rules provides that a court may strike from a pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). A court has "liberal discretion" to strike pleadings as it deems appropriate. *S.E.C. v. Lauer*, 2007 WL 1393917, at *2 (S.D. Fla. Apr. 30, 2007) (citing cases). An affirmative defense should be stricken where it is insufficient as a matter of law. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1057 (5th Cir.1982). A defense is insufficient as a matter of law when (1) on the face of the pleadings it is patently frivolous, or (2) it is clearly invalid as a matter of law. *Microsoft Corp. v. Jesse's Computers & Repair, Inc.*, 211 F.R.D. 681, 683 (M.D.Fla.2002).

Motions brought under Rule 12(f) serve "to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Doe v.*

Roman Catholic Diocese of Galveston-Houston, 2006 WL 2413721, at *2 (S.D. Tex. Aug. 18, 2006). Thus, although motions to strike are "generally disfavored," a motion to strike a defense as insufficient "should be granted where it is clear that the affirmative defense is irrelevant and frivolous and its removal from the case would avoid wasting unnecessary time and money litigating the invalid defense." *Intex Recreation Corp. v. Team Worldwide Corp.*, 390 F. Supp. 2d 21, 24 (D.D.C. 2005).

B. Affirmative Defenses Must Give "Fair Notice" to the Plaintiff

Affirmative defenses are subject to the general pleading requirements of Rule 8, which requires a defendant to "state in short and plain terms its defenses to each claim asserted against it" and "affirmatively state any avoidance or affirmative defense." Fed. R. Civ. P. 8. A defendant must plead an affirmative defense with enough specificity or factual particularity to impart "fair notice" to the plaintiff of the defense that is being advanced. *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999). A plaintiff has "fair notice" when the defendant "sufficiently articulates the defense so that plaintiff is not a victim of unfair surprise." *Id*.

II. The Challenged Affirmative Defenses are Insufficient as a Matter of Law and Failure to Strike Those Invalid Defenses Would Prejudice the EEOC

As detailed more fully below, the affirmative defenses that are the subject of this motion should be stricken because they are invalid as a matter of law.

A. Affirmative Defense "(L)": EEOC Failed to Conciliate in Good Faith

Defendant's affirmative defense "(L)" fails as a matter of law because "failure to conciliate in good faith" is no longer a valid defense to an EEOC enforcement action after the Supreme Court's decision in *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645, 1655-56 (2015).[1]

[1] Defendant's affirmative defense "(L)" states: "Defendants aver that the EEOC failed to conciliate in good faith before filing this lawsuit as required by 42 U.S.C. §2000e-5(b); and more specifically, the EEOC failed to outline to Williams' alleged employer the reasonable cause for its belief that the law was violated; the EEOC failed to offer an

Prior to *Mach Mining*, the rule in the Fifth Circuit was that the EEOC must conciliate in "good faith" to satisfy its obligations under 42 U.S.C. § 2000e-5(b). Under the old standard, a "good faith" attempt at conciliation required the EEOC to "(1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer." *EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 468 (5th Cir. 2009).

Mach Mining explicitly rejected this good faith standard.[2] Instead, *Mach Mining* explained that although conciliation efforts remain "a prerequisite to the EEOC's filing of a...lawsuit...the obligation to conduct those efforts in good faith is not a component of the requirement." *Equal Employment Opportunity Comm'n v. Rosebud Restaurants, Inc.*, 2015 WL 5852925, at *1 (N.D. Ill. Oct. 7, 2015) (striking affirmative defense asserting the EEOC has failed to conciliate in good faith as insufficient as a matter of law in light of *Mach Mining*).

In *Mach Mining*, the Supreme Court examined the extent of the EEOC's conciliation obligations under the law. The Court first recognized the "expansive discretion" Title VII affords the EEOC to "decide how to conduct conciliation efforts and when to end them." *Mach Mining*, 135 S.Ct. at 1656. The Court next held that review of whether the EEOC has met its pre-suit conciliation obligations is limited to two inquiries: (1) whether the EEOC informed the employer about the specific allegation, and (2) whether the EEOC tried to engage the employer in some form of discussion (whether written or oral) so as to give the employer an opportunity to remedy the allegedly discriminatory practice. *Id.* at 1652; *see also U.S. Equal Employment Opportunity Comm'n v. Dimensions Healthcare Sys.*, 2016 WL 3055300, at *3 (D. Md. May 27,

---

opportunity for voluntary compliance and/or failed to respond in a reasonable and flexible manner to the reasonable attitudes of Williams' alleged employer." (Doc. 5, p. 7).

[2] Nor, as explained *infra* does the *Mach Mining* standard for conciliation require the EEOC "outline to the employer the reasonable cause for its belief that Title VII was violated" or require the EEOC to "respond in a reasonable and flexible manner" to discharge its pre-suit conciliation obligations as Defendant's affirmative defense "L" asserts.

2016). *Mach Mining* noted explicitly that in determining whether the EEOC has met its pre-suit conciliation obligations, a court "looks only to whether the EEOC attempted to confer about a charge, and not to what happened (i.e., statements made or positions taken) during those discussions." *Mach Mining*, 135 S. Ct. at 1656.

Here, Defendant's affirmative defense "(L)" (Doc. 5, p. 7) simply tracks the language of the old (and now invalid) pre-*Mach Mining* standard of review. *See*, *e.g.*, *EEOC v. Agro Distribution*, *LLC*, 555 F.3d 462, 468 (5th Cir. 2009). Specifically, Defendant's affirmative defense asserts that the EEOC "failed to conciliate in good faith" because the EEOC did not outline the reasonable cause for its belief Title VII was violated, did not offer an opportunity for voluntary compliance, and failed to respond in a reasonable and flexible manner. *Id*. But *Mach Mining* does not require the EEOC to justify its reasonable cause determination as part of conciliation. It simply requires the EEOC in conciliation to inform the employer about the allegation. *Mach Mining*, 135 S. Ct. at 1652. Nor does *Mach Mining* require the EEOC "offer an opportunity for voluntary compliance", as Defendant claims the EEOC failed to do here. Instead it requires the EEOC to "attempt to confer about the charge" in order to achieve voluntary compliance. *Id*. at 1656. Finally *Mach Mining* does not require the EEOC to "respond in a reasonable and flexible manner to the reasonable attitudes of the employer." (Doc. 5, p. 7). In fact, *Mach Mining* forecloses any type of inquiry into the reasonableness of the EEOC's conduct during negotiations. *See Mach Mining* 135 S. Ct. at 1656 ("[a court] looks only to whether the EEOC attempted to confer about a charge, and not to what happened (i.e., statements made or positions taken) during those discussions."). In short, affirmative defense "(L)" that Defendant seeks to apply to this action no longer exists.

Allowing Defendant in the present case to continue to pursue (and subject the EEOC to discovery on) this affirmative defense would severely prejudice the EEOC by making it more difficult for the EEOC to realize Title VII's preference for resolving charges of discrimination informally, through conciliation. As noted in *Mach Mining*, a "good faith" standard requires a court to assess the EEOC's motives. This more expansive review, in turn, will often "necessitate the disclosure and use of [confidential conciliations materials] in a later Title VII suit" thereby "flout[ing] Title VII's protection of the confidentiality of conciliation efforts." *Id.* at 1655. The Supreme Court has found that the confidentiality provisions in Title VII "ensure candor" between the parties during conciliation and thereby facilitate the informal resolution of discrimination charges. *Id.* Any conduct that weakens the confidentiality provisions of Title VII, will inhibit candor between the parties during conciliation, and, as a result, hinder the EEOC's effectiveness in reaching settlements through conciliation—clearly Title VII's preferred method of resolution. *Id.* at 1651. Intrusive discovery into the "good faith" of EEOC conciliation efforts in this case would do just that.

The Court should strike this affirmative defense as it is clearly invalid as a matter of law and, if not stricken, will severely prejudice the EEOC and the public interest.

B. Sixth Affirmative Defense: Reservation of Right to Add Affirmative Defenses Later

Defendant's sixth affirmative defense fails as a matter of law because it is not an affirmative defense at all.[3] It is "nothing more than an assertion of a right to amend its answer if it comes up with any more affirmative defenses." *Smith v. City of New Smyrna Beach*, 2011 WL 6099547, at *1 (M.D. Fla. Dec. 7, 2011)(granting motion to strike identical reservation of right to add affirmative defenses at a later date); *Bertoniere v. First Mark Homes, Inc.*, 2010 WL

[3] Defendant's sixth affirmative defense states: "Defendants reserve the right to alter, amend, raise or add affirmative defenses as discovery progresses and during any other proceeding in this action." (Doc. 5, p. 2).

729931, at *2 (S.D. Miss. Feb. 25, 2010) (granting motion to strike identical affirmative defense).

The attempt to reserve the right to add additional defenses at some, unspecified time in the future has "been held ….to be an invalid affirmative defense." *Int'l Metalizing & Coatings, Inc. v. M & J Constr. Co. of Pinellas Cty*., 2010 WL 2889687, at *2 (M.D. Fla. July 19, 2010)(granting motion to strike identical reservation of right to add affirmative defenses at a later date)(citing additional authority).

In *International Metalizing*, the district court granted the plaintiff's motion to strike a similar reservation of rights. The court explained that such a reservation was insufficient as a matter of law because such reservations are improper under the Federal Rules of Civil Procedure. Under Federal Rule 8(c) and Rule 12(b) the time to plead an affirmative defense is at the time the answer is filed. A defendant wishing to assert additional affirmative defenses after an answer is filed is required to do so under Rule 15. It cannot bypass the detailed pleading rules established by the Federal Rules by inserting a reservation of right in its answer.

Likewise courts across the country have found this reservation has no legal validity. *F.D.I.C. v. Mahajan*, 923 F. Supp. 2d 1133, 1141 (N.D. Ill. 2013)(granting motion to strike reservation of right to add affirmative defenses at a later time); *Merrill Lynch Bus. Fin. Servs., Inc. v. Performance Mach. Sys. U.S.A., Inc.*, 2005 WL 975773, at *12 (S.D. Fla. Mar. 4, 2005)(granting motion to strike reservation of right to add additional affirmative defenses later). *See also*, *E.E.O.C. v. SVT, LLC*, 2013 WL 6045972, at *3 (N.D. Ind. Nov. 14, 2013) (same).

Moreover, the assertion of the right to add new and indeterminate affirmative defenses as they become known violates the fair notice pleading requirement of Rule 8. *Bertoniere v. First Mark Homes, Inc.*, 2010 WL 729931, at *2 (S.D. Miss. Feb. 25, 2010) (granting motion to strike identical reservation of right on the grounds that it failed to provide fair notice). It provides the plaintiff with no notice as to the nature of the defense being asserted against his claim, a result that the drafters of the Federal Rules clearly wished to avoid. *Id*.

Defendant's reservation in the present case suffers from the same flaws as the identical affirmative defenses stricken in the cases cited above. It contains no substance. It does not fairly place the EEOC on notice of the defense being asserted. It is a "nullity and mere surplusage." *Merrill Lynch*, at *12. As a result, it is insufficient as a matter of law and due to be stricken.

CONCLUSION

This Court should strike the challenged affirmative defenses cited herein. The challenged affirmative defenses are legally insufficient. The Court can avoid a waste of time and resources early on in this litigation by striking these invalid defenses.

Dated: December 22, 2016

Respectfully submitted,

MARSHA L. RUCKER
Regional Attorney
PA Bar No. 90041

/s/Christopher Woolley
CHRISTOPHER WOOLLEY
Trial Attorney
CA Bar No. 241888
christopher.woolley@eeoc.gov

ALYSIA D. FRANKLIN
Trial Attorney
CA Bar No. 264410
alysia.franklin@eeoc.gov

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1130 22nd Street South

Suite 2000
Birmingham, AL 35205
Phone: (205) 212-2064

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2016, I filed the foregoing with the Clerk of Court using the CM/ECF system which will electronically send notification of the filing to all attorneys of record.

/s/ Christopher Woolley
Christopher Woolley